STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 22, 2007
v	No. 263213 Berrien Circuit Court
LONNIE LADEAN KESTNER, Defendant-Appellant.	LC No. 2005-400889-FH

Before: Hoekstra, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

After a jury trial, defendant Lonnie Ladean Kestner was convicted of one count of operating or maintaining a methamphetamine laboratory, MCL 333.7401c(2)(f), and one count of delivering or manufacturing methamphetamine, MCL 333.7401(2)(b)(*i*). He was sentenced as a repeat controlled substance offender, MCL 333.7413(2), to enhanced concurrent terms of 9 to 40 years' imprisonment. He appeals as of right. We affirm.

I. Facts

Defendant's convictions arise from his participation in methamphetamine manufacturing activities in New Buffalo, Michigan, between November 2004 and January 2005. Defendant and his brother, Christopher Kestner, began producing methamphetamine in the basement of William Marvin-John Dohner's home in late 2004. Near Christmas 2004, Dohner ejected them from the house. Soon thereafter, defendant and Christopher resumed the operation in the home of Timothy Sheeler, who lived next door to Dohner. Sheeler ejected the brothers from his house in early 2005, but he did not discard the garbage and other residue left over from the methamphetamine production. Soon thereafter, law enforcement officers searched Sheeler's home and found trash cans full of materials associated with methamphetamine production, including matchbooks with the striker plates removed, empty packages of over-the-counter cold medicines containing pseudoephedrine, and empty containers of solvent. No evidence was found in Dohner's house, but Dohner admitted that he had removed the remaining traces of methamphetamine production after defendant left his house.[1] After defendant and Christopher

[1] Sheeler and Dohner were charged with offenses related to methamphetamine production, but agreed to enter guilty pleas to reduced charges in exchange for their testimony against defendant (continued…)

were forced to leave Sheeler's home, they stored their methamphetamine production equipment in a bedroom in the home of Michelle Hollihan (formerly known as Michelle Parker).[2] Law enforcement officials found this equipment during a search of Hollihan's home.

II. Ineffective Assistance of Counsel

Defendant argues that he was denied the effective assistance of counsel when his trial attorney failed to move to suppress the testimony of Sheeler, Dohner, Hollihan, and David Zelmer.[3] He also contends that his counsel was ineffective for not pursing a defense based on involuntary intoxication and temporary insanity.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because defendant "failed to move for a new trial or an evidentiary hearing with regard to his claim, review is limited to mistakes apparent on the record." *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

The right to effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). To establish a claim of ineffective assistance of counsel, defendant "must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To establish prejudice, "defendant must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . .'" *Id.* at 302-303, quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). Defendant must also overcome the presumption that the challenged action constitutes sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

A. Failure to Suppress Dohner's, Sheeler's, and Hollihan's Testimony

Defendant argues that his trial counsel should have moved to suppress the testimony of Dohner, Sheeler, and Hollihan because the prosecutor failed to disclose the details of Dohner's and Sheeler's plea agreements and Hollihan's immunity agreement to defendant before trial. We disagree.

The prosecutor has a duty to disclose the details of a witness's plea agreement, immunity agreement, or other agreement for testimony to the defendant and, on request, to the jury. MCR 6.201(B)(5); *People v Cadle*, 204 Mich App 646, 654; 516 NW2d 520 (1994), overruled in

(…continued)

at trial.

[2] Although defendant and Christopher possibly produced methamphetamine at Hollihan's home during this time, defendant is not charged in relation to the activity at Hollihan's home.

[3] Zelmer testified that defendant purchased large quantities of iodine from his feed store on several occasions in late 2004. Iodine is used in the production of methamphetamine.

part on other grounds by *People v Perry*, 460 Mich 55 (1999). In this case, it is not apparent from the record what information was provided to defendant before trial concerning the witnesses' plea and immunity agreements. However, the witnesses testified at trial regarding their plea and immunity agreements, and defense counsel extensively cross-examined these witnesses about their agreements in relation to their motives for testifying against defendant. The trial court record provides no basis for concluding that defendant was unaware of the witnesses' plea and immunity agreements before trial. Further, the details of the agreements were presented to the jury. Accordingly, any alleged failure by the prosecution to disclose the details of these agreements before trial did not prejudice defendant and deprive him of a fair trial.[4]

B. Failure to Exclude Zelmer's Testimony

Defendant also argues that his counsel should have moved to exclude Zelmer's testimony because it was the product of illegal police conduct. However, the only support in the trial court record for defendant's assertion that his disclosure regarding where he purchased the iodine solution occurred during an illegal police interview is found in defendant's self-serving affidavit, which alleges that the prosecutor learned about Zelmer's identity during an interview with defendant in which she had agreed not to use defendant's statements against him. Defendant fails to provide any independent factual basis to support his claim that this alleged conversation was conducted illegally, or that it even occurred. "'Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position.'" *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001), quoting *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Because defendant fails to provide more than mere self-serving accusations to support his assertion of error, he fails to establish that his trial counsel was ineffective for failing to move to strike Zelmer's testimony.

C. Failure to Seek a Medical Evaluation

Next, defendant argues that his trial counsel should have sought a medical evaluation to explore the viability of a temporary insanity defense based on defendant's involuntary intoxication. Defendant maintains that his chronic, long-term drug use constituted a form of involuntary intoxication that rendered him unable to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. We do not agree. MCL 768.37(1)

[4] Regardless, even if defense counsel could have established that a violation of MCR 6.201(B)(5) occurred, we are not persuaded that the appropriate remedy would have been to suppress the witnesses' testimony. Rather, MCR 6.201(J) gives the trial court discretion to "order the party to provide the discovery . . . or enter such other order as it deems just under the circumstances." In this case, a more appropriate remedy would have been to require the prosecutor to disclose the terms of the witnesses' plea and immunity agreements, not to suppress their testimony. As previously indicated, however, the record discloses that the witnesses' plea and immunity agreements were fully presented to the jury and explored by defense counsel on cross-examination, and there is no indication that defense counsel was unprepared to cross-examine the witnesses concerning their agreements.

provides that voluntary intoxication is not a defense to any crime.[5] A defendant may have a temporary insanity defense based on involuntary intoxication "when the chemical effects of drugs or alcohol render the defendant temporarily insane." *People v Caulley*, 197 Mich App 177, 187; 494 NW2d 853 (1992). Here, however, there is no evidence that defendant involuntarily became intoxicated on any occasion. In particular, defendant provides no evidence indicating that he was forced to consume intoxicating substances against his will. He has not cited any authority that supports his position that intoxication is not voluntary if the drug user is addicted to the intoxicating substance. Further, defendant provided no evidence indicating that his alleged drug use interfered with his ability to appreciate the wrongfulness of his conduct or to conform his behavior to the law, or that he was impaired throughout the entire period that the methamphetamine operation was taking place. See *People v Carpenter*, 464 Mich 223, 230-231; 627 NW2d 276 (2001); MCL 768.21a(1). Defendant is responsible for his actions, and his addiction cannot be an excuse for his wrongful, dangerous, and illegal behavior. Accordingly, defendant's argument lacks merit. His trial counsel was not ineffective for failing to advocate this meritless position. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

III. Unanimity Instruction

Defendant argues that, because the evidence presented at trial indicated that defendant and Christopher produced methamphetamine at more than one location, the trial court erred when it failed to give a special unanimity instruction to prevent the jurors from convicting defendant if they disagreed about the location where he produced the methamphetamine. Defendant also argues that he was entitled to a limiting instruction advising the jury that Christopher's prior inconsistent statements could only be considered in evaluating Christopher's credibility, not as substantive evidence. However, defendant's trial counsel failed to request these instructions at trial and approved the instructions as given. Defense counsel's affirmative approval of the trial court's jury instructions waived any claim of error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Defendant argues that his counsel was ineffective for failing to request these instructions at trial. We disagree. Even if it would have been appropriate to give the instructions, defendant has not established the requisite prejudice to prevail on a claim of ineffective assistance of counsel. A general unanimity instruction suffices when materially identical evidence is presented with respect to each act and when there is no juror confusion. *People v Cooks*, 446 Mich 503, 512-513; 521 NW2d 275 (1994). The trial court gave a general unanimity instruction. The evidence concerning the methamphetamine operations at the two locations was not materially different, nor did the admission of this evidence in the absence of a unanimity instruction establish a reasonable probability that jurors would be confused or would believe that defendant was involved in the operation at one location but not the other. Under these circumstances, we find no reasonable probability that the outcome would have been different if a special unanimity instruction had been given. *Toma*, *supra* at 302-303; Further, in light of the testimony from Sheeler, Dohner, Hollihan, and Zelmer establishing defendant's direct

[5] MCL 768.37(2) provides an exception where a defendant unexpectedly becomes intoxicated from reasonable use of a legally obtained substance, but this exception is not applicable here.

participation in the methamphetamine production, there is no reasonable probability that Christopher's prior inconsistent statements to his probation officer affected the outcome.

IV. Inadmissibility of MRE 404(b) Evidence

Defendant argues that the trial court erroneously admitted evidence that he was associated with methamphetamine production at Hollihan's house because this evidence was inadmissible under MRE 404(b). We do not agree. We review the trial court's decision to admit this evidence for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002).

MRE 404(b) prohibits the admission of other bad acts evidence to prove a person's character, but it permits the admission of this evidence for other purposes, "such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident . . . ." Essentially, evidence is admissible if it is offered for something other than a character or propensity theory. To be admitted, evidence must also be relevant and, pursuant to MRE 403, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. *People v Knox*, 469 Mich 502, 509-510; 674 NW2d 366 (2004).

The principal issue at trial was whether defendant was involved in the methamphetamine production that occurred at Dohner's and Sheeler's homes. Evidence that defendant helped transport the methamphetamine supplies to Hollihan's house was probative of defendant's knowledge of and involvement in the methamphetamine operation at Dohner's and Sheeler's homes and so was admissible for a non-character purpose. Specifically, it revealed that defendant engaged in a scheme of befriending individuals with histories of addiction to alcohol and narcotics, introducing or reintroducing them to methamphetamine, and then using their homes to manufacture methamphetamine in exchange for payments of the drug. Further, the evidence was not unduly prejudicial under MRE 403, especially in light of the trial court's cautionary instructions advising the jurors of the limited purpose of the evidence. The trial court did not abuse its discretion when it admitted this evidence.

V. Prosecutorial Misconduct

Defendant argues that the prosecutor committed misconduct when she cross-examined Christopher Kestner and Tracy Kestner. We disagree. Because defendant did not challenge the prosecutor's cross-examinations of these witnesses at trial, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

"The prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Defendant had approximately $1,400 in cash with him when he was arrested. In a written statement, he claimed that Stephanie Woodruff, a family acquaintance, was his wife and that the $1,400 was from her income tax refund. When the prosecutor questioned Tracy regarding whether she knew that defendant had referred to Woodruff as his wife, she was not attempting to portray defendant as an adulterer. Instead, she was attempting to challenge Tracy's credibility with respect to her knowledge of defendant's habits and conduct during the relevant time period. This credibility

challenge was relevant because it permitted the jury to determine the reliability of Tracy's claims that defendant primarily spent his time between November 2004 and January 2005 at work or at home with her.

The prosecutor also sought to elicit testimony from Christopher indicating that he had made a prior statement that was inconsistent with his trial testimony, in which he claimed that defendant was not involved in producing methamphetamine. Christopher's prior inconsistent statement was properly admitted for impeachment purposes.

Defendant also alleges that the prosecutor committed misconduct when she questioned defendant at trial regarding a civil forfeiture action. However, when the prosecutor initially asked defendant a question regarding the forfeiture action, defense counsel objected. The prosecutor chose not to continue with that line of questioning. Defendant fails to explain how, under these circumstances, this brief mention of the civil forfeiture proceeding prejudiced him.

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. [*Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).]

Because defendant failed to provide any substantive basis for this assertion of error, it is waived and we will not consider it further.

Further, defendant claims that the prosecutor's closing argument "focused on and injected issues broader than the guilt or innocence of the defendant." However, defendant does not explain how the referenced portions of the prosecutor's argument raise issues broader than defendant's guilt or innocence, and we do not find that the prosecutor's closing argument was impermissibly broad. Accordingly, defendant also abandons this issue on appeal, and we will not consider it further. *Id.*

VI. Sentencing

A. Sentence Enhancement for Prior Conviction

Defendant argues that he is entitled to resentencing or remand for a *Tucker/Moore*[6] hearing to determine the validity of his 1993 conviction in Kentucky for trafficking marijuana, which the trial court used to enhance his maximum sentence as a repeat controlled substance offender under MCL 333.7413(2).[7] Defendant notes that his presentence investigation report (PSIR) states "unknown" under the "attorney present" heading for this conviction. He argues

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[6] *United States v Tucker*, 404 US 443; 92 S Ct 589; 30 L Ed 2d 592 (1972); *People v Moore*, 391 Mich 426; 216 NW2d 770 (1974).

[7] MCL 333.7413(2) states, "[A]n individual convicted of a second or subsequent offense under this article may be imprisoned for a term not more than twice the term otherwise authorized or fined an amount not more than twice that otherwise authorized, or both."

that based on the record before the trial court, the prosecutor failed to establish that defendant either had counsel or validly waived his right to counsel when he was convicted in 1993 and, therefore, the enhancement of his sentence based on his unconstitutional 1993 conviction is unlawful. We disagree.

A sentencing court may not consider a defendant's prior conviction if it was obtained in violation of the defendant's Sixth Amendment right to counsel as articulated in *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963). *People v Carpentier*, 446 Mich 19, 28-30; 521 NW2d 195 (1994); *People v Alexander*, 234 Mich App 665, 670; 599 NW2d 749 (1999). However, "[a] defendant who collaterally challenges a prior conviction bears the initial burden of establishing that the conviction was obtained without either counsel or a proper waiver of counsel." *Alexander*, *supra* at 670. To obtain a *Tucker/Moore* hearing to determine the validity of a prior conviction, the defendant must either present prima facie proof that a previous conviction violated *Gideon* (such as a docket entry or transcript showing the absence of counsel) or evidence that he requested these records from the court imposing the disputed prior conviction, but that the court either refused to provide the records or failed to respond. *Carpentier*, *supra* at 32-35.

Here, defendant has not satisfied this initial burden of proof. Although he provided docket entries from the Kentucky court in which he was convicted of trafficking marijuana, the docket listing does not provide any information regarding the parties' attorneys or the absence of the same. Defendant also submitted an affidavit from a clerical worker who averred that she contacted the Kentucky court and was told there were no records of defendant's 1993 conviction and that she contacted a public defender office in Kentucky and learned that the office had no record indicating that defendant had been a client. We cannot draw any useful inference from this lack of information from these sources regarding whether an attorney represented defendant during the 1993 proceedings or whether defendant waived his right to assistance of counsel. Defendant presented no evidence indicating that the Kentucky court refused to provide records, and no evidence indicating that he was not provided with representation when he was convicted in 1993. Accordingly, defendant failed to overcome the presumptive validity of his 1993 conviction. He is not entitled to resentencing or a *Tucker/Moore* hearing.

B. Discretion under MCL 333.7413(2)

Defendant's argument that resentencing is necessary because the trial court failed to recognize its discretion to enhance defendant's sentences under MCL 333.7413(2) is without merit. Enhancement of a sentence under MCL 333.7413(2) is discretionary, rather than mandatory. *People v Green*, 205 Mich App 342, 345; 517 NW2d 782 (1994). Further, resentencing is required where a court fails to exercise its discretion because it mistakenly believes that enhancement is mandatory. *Id.* at 346-347. But in the absence of any clear evidence that a sentencing court believed that it lacked discretion, the presumption that the court understood its sentencing discretion must prevail. *Alexander*, *supra* at 675. Here, there is no indication in the record that the trial court was unaware of its discretion to impose an enhanced sentence. Thus, resentencing is not required.

C. Failure to Review Presentence Report

Defendant argues that the trial court failed to review defendant's PSIR before sentencing him and failed to give him a reasonable opportunity to challenge the PSIR at sentencing. However, nothing in the trial court record supports this allegation. Conversely, the record indicates that the trial court spent considerable time addressing the challenges raised by the parties at sentencing. Further, before imposing a sentence, the trial court asked the parties' counsel, and asked defendant personally, whether they had any further challenges to the information contained in the PSIR. After verifying that there were no additional challenges, the trial court indicated that it had read the presentence report carefully. Defendant's argument lacks merit.

D. Disproportionality of Sentence

Defendant argues that the trial court never explained the basis for its decision to impose a 40-year maximum sentence and a nine-year minimum sentence on him. We disagree. At sentencing, the prosecutor advised the trial court that pursuant to MCL 333.7413(2), defendant was subject to a 40-year maximum sentence because he was a repeat controlled substance offender. It is apparent from this statement that the trial court imposed a 40-year maximum sentence pursuant to MCL 333.7413(2), because this sentence was double the maximum sentence authorized for the conviction offenses pursuant to MCL 333.7401c(2)(f) and MCL 333.7401(2)(b)(*i*).

Further, defendant's minimum sentence is appropriate. "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10). The trial court determined that the appropriate minimum sentencing guidelines range was 72 to 120 months and concluded that the guidelines range correctly captured the seriousness of defendant's convictions and prior criminal history. The court's reference to the guidelines when imposing a sentence within the guidelines range constitutes a sufficient explanation for its decision to impose a nine-year minimum sentence. See *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006).

Defendant asserts that the trial court did not have accurate information about him because the PSIR only described uncharged offenses. Yet defendant did not challenge the accuracy of the PSIR on this basis at sentencing. Although the PSIR summarizes the circumstances involving the discovery of a methamphetamine operation at Hollihan's house, but not at Sheeler's house, defendant does not contend that the information is inaccurate. He merely argues that it does not pertain to the offenses for which he was convicted. To the extent that the PSIR was deficient in this respect, however, the record discloses that the trial court commented at sentencing that it "did listen carefully to the testimony during the course of the trial" and was "very familiar with this entire situation." In light of these comments, we conclude that the trial court was aware of the circumstances surrounding the offense of which defendant was convicted.

Defendant also argues that the sentencing court failed to consider his rehabilitative potential when it imposed its sentence. We disagree. The record indicates that the trial court considered defendant's rehabilitative potential at sentencing, but found it to be poor. Notably, the court commented that defendant had a "terrible" and "longstanding" criminal record. According to the PSIR, defendant has a lengthy criminal history involving drug offenses,

robbery, assault, conversion, and attempted robbery beginning in 1988 and continuing through 2004. He also has a history of violating probation. Moreover, defendant admitted that he has abused drugs for 20 years and failed to benefit from inpatient treatment. Regardless, because defendant was sentenced within the range established by the sentencing guidelines and because he failed to show that his sentence was affected by a scoring error or inaccurate information, we affirm his sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003).

Finally, defendant argues that the disproportionality of his sentence constitutes cruel and unusual punishment. US Const, Am VIII; Const 1963, art 1, § 16. We disagree. The limitation on the review of sentences within the guidelines range is inapplicable to claims of constitutional error. *Conley, supra* at 316. Regardless, a sentence within the guidelines range is presumptively proportionate, *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994), and proportionate sentences do not constitute cruel and unusual punishment, *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002). Considering defendant's lengthy criminal record and failure to benefit from prior opportunities for rehabilitation, his sentences qualify as proportionate and, accordingly, there is no merit to his argument that they are cruel and unusual.

E. OV 14 Scoring

Defendant argues that the trial court erred in assigning ten points for offense variable (OV) 14. Specifically, he argues that Christopher alone led the operation. We disagree. We uphold a trial court's scoring decision if any evidence exists to support a particular score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

The sentencing court may score ten points for OV 14 if the offender was a leader in a multiple-offender situation. MCL 777.44(1)(a). If three or more offenders were involved, the trial court may conclude that more than one offender was a leader. MCL 777.44(2)(b). The trial court determined that defendant and Christopher were co-leaders. In particular, the court noted that defendant used his acquaintanceship with Dohner to bring Christopher into Dohner's house and start methamphetamine production in the basement. Defendant then used his connection with Sheeler to move the operation to Sheeler's house next door. In addition, Dohner testified that defendant often appeared to supervise the production. This evidence supports the trial court's inference that defendant and Christopher jointly led the operation. Accordingly, the trial court did not err when it scored ten points for OV 14.

F. *Blakely* Violation

Finally, defendant argues that resentencing is necessary because the trial court relied on facts not found by the jury when imposing its sentence in violation of *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000). In these cases, the United States Supreme Court held that a sentencing court may not increase a defendant's maximum sentence based on facts not found by a jury. In *People v Drohan*, 475 Mich 140, 159-162, 164; 715 NW2d 778 (2006), however, our Supreme Court held that these decisions do not apply to Michigan's indeterminate sentencing scheme, because the defendant's maximum sentence is fixed by statute and the sentencing guidelines affect only the minimum sentence. Defendant's claim of error lacks merit.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens